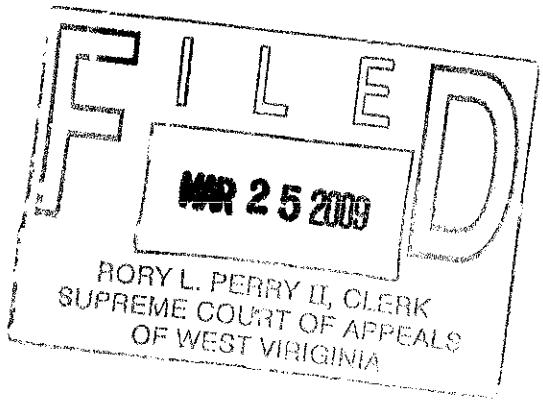
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 082094

RONALD LEE HARRISON and
BRENDA G. HARRISON,
Plaintiffs-Appellees,

v.

SKYLINE CORPORATION,
Defendant-Appellant.



BRIEF OF APPELLEES

Appeal from the Circuit Court of Jackson County, West Virginia
Honorable Thomas C. Evans, III, Judge
Civil Action No. 05-C-50

Frank Venezia (W.V. State Bar No. 4637)
Jamie F. Little (W.V. State Bar No. 10680)
SHAFFER & SHAFFER, PLLC
330 State Street
P.O. Box 38
Madison, West Virginia 25130
(304) 369-0511

Thomas N. Whittier (W.V. State Bar No. 4029)
HEDGES, JONES, WHITTIER & HEDGES
P.O. Box 7
Spencer, West Virginia 25276
(304) 927-3790

Counsel for Appellees, Ronald Lee Harrison and Brenda G. Harrison

Table of Contents

Table of Authorities

FEDERAL STATUTES

CODE OF FEDERAL REGULATIONS

WEST VIRGINIA STATUTES

OTHER AUTHORITIES

I. OVERVIEW

Appellees, Ronald Lee Harrison and Brenda G. Harrison (hereinafter "Appellees"), substantively agree with the Kind of Proceeding and Nature of Ruling Below, Standard for Certification, and Standard for Review set forth by Appellant, Skyline Corporation (hereinafter "Appellant" or "Skyline"). While Appellees disagree with Appellant's Argument, they concur that the issues upon appeal include (1) whether or not 42 U.S.C. § 5403(d) pre-empts Appellees' formaldehyde-based negligence claims; (2) whether or not the Appellees may introduce the ambient air samples taken from their home into evidence; and (3) whether or not the "savings clause" of 42 U.S.C. § 5409(c) precludes the circuit court from granting Appellant's motions for summary judgment. The Appellees respectfully advise the Court that they do not believe the *Supremacy Clause* of the U.S. Constitution has been triggered, and is not the true issue in this matter. However, the Appellees present their positions as follows and request that this honorable Court affirm the decisions of the Jackson County Circuit Court.

II. COUNTER-STATEMENT OF RELEVANT FACTS

Appellant's Statement of Relevant Facts omitted documented evidence and gives the false impression that it was the actions of the Appellees, and not the actions of Appellant, that resulted in the elevated formaldehyde levels within the subject manufactured home.

During the construction of the subject manufactured home in 1995, Skyline used pressed wood decking which contained formaldehyde.[1] The pressed wood used by Skyline in the construction of the subject home was manufactured by Georgia-Pacific Corporation.[2] Per federal regulations, each piece of wood decking supplied by Georgia-Pacific Corporation to Skyline was

[1] *See* Compl. ¶ 33 (Apr. 11, 2005).

[2] *See Id.* at ¶ 32.

stamped with the notice that it contained "Particulated Formaldehyde" and that it was "manufactured wood decking."[3]

The Appellees moved into the subject manufactured home in December 1999.[4] At the time the Appellees moved into their home they were not warned that the subject manufactured home contained formaldehyde, as the home did not contain any notice regarding the formaldehyde as required by federal law.[5] The Appellees also did not see any of the stamps regarding the formaldehyde placed on the wood decking by Georgia-Pacific Corporation as they were hidden from view. *Id.*

Within the first year of moving into the subject home the Appellees began experiencing unexplainable health problems.[6] Sometime in 2003 the Appellees contacted the Weavertown Environmental Group (hereinafter "Weavertown") to conduct testing on the air in their home to see if something in the home was contributing to their health issues.[7] On May 12, 2003 and August 27, 2003, Weavertown collected various air samples from the subject manufactured home.[8] The Weavertown Report indicated that there was a presence of formaldehyde with levels over the exposure limit standards of the National Institute for Occupational Safety and Health (hereinafter "NIOSH") and the American Conference of Governmental Industrial Hygienists (hereinafter "ACGIH").[9] The Weavertown Report also indicated that the levels of formaldehyde

---

[3] *See Id.* at ¶ 33.

[4] *See Id.* at ¶ 16.

[5] *See Id.* at ¶ 36.

[6] *See Id.* at ¶ 20.

[7] *See Id.* at ¶ 24.

[8] *See* Memo. of Law of Pl.s' in Response to Def. Skyline's Mot. for S.J. (Apr. 13, 2006).

[9] *See Id.* at 11:15-25.

did not exceed the exposure limit standards of the Occupational Safety and Health Administration (hereinafter "OSHA").[10] The Weavertown Report also indicated that the OSHA standards were based on "occupational" exposure which should be much higher than those standards for "residential" exposure.[11] The Weavertown Report recommended that the Appellees wear respirators to limit their exposure to the formaldehyde while in their home.[12] In December 2003, after receiving the Weavertown Report regarding the formaldehyde levels, the Appellees moved out of the subject manufactured home due to health and safety concerns.[13]

In April 2004, Bill White, an inspector with the U.S. Department of Housing and Urban Development, performed an inspection on the subject manufactured home to determine Appellant's compliance with *West Virginia Code* § 42-19-10A of the Manufactured Housing Construction and Safety Standards Board.[14] During his deposition, Mr. White concluded that the formaldehyde levels would have been elevated because of the inordinately excessive particle board debris that contaminated the air ducts during the home's construction and assembly.[15] Mr. White stated he found "large quantities of particle board dust, scrap pieces of particle board, scrap electrical wire, scrap paper, screws, scrap pieces of vinyl floor covering and small cuttings from other materials in the registers of the home."[16] Mr. White further stated that he knew this

---

[10] *See* Or. Denying Mot. for S.J. 6:4-8 (Oct. 10, 2007).

[11] *See Id.* at 11:8-11.

[12] *See Id.* at 11:11-13.

[13] *See* Compl. ¶ 25.

[14] *See* Or. Denying Mot. for S.J. 5:8-9.

[15] *See* Depo. Bill White 47:10-15 (Feb. 7, 2006).

[16] *See Id.* at 41:5-10.

scrap material, including the scrap particleboard, was "factory-generated" meaning that its source was the Appellant.[17] He knew the Appellant was the source of the scrap material "[b]ecause the material was too big to have gone through the registers . . . [a]nd it [was] typical factory debris."[18] Mr. White noted that a "good manufacturing plant" would have vacuumed the floor registers with a shop vacuum to remove such debris.[19] Mr. White found debris in every register he checked while investigating the Appellees' home.[20] Mr. White also stated that he noticed an odor in the Appellees' home which "smelled like the interior of a new manufactured home that [had] been closed up in hot weather, and [the odor] may [have been] a result of formaldehyde emissions."[21]

In April 2006, R. Allan Wells, a Certified Industrial Hygienist, inspected the subject manufactured home and took various ambient air samples.[22] In his report, Mr. Wells concluded there was an elevation of formaldehyde within the subject manufactured home.[23] His report stated that although there were no regulatory exposure limits for formaldehyde in residential homes, there were a number of recommended guidelines such as the World Health Organization (hereinafter "WHO") and the Agency for Toxic Substance and Disease Registry (hereinafter "ATSDR").[24] The samples that Mr. Wells had collected from inside the subject manufactured

---

[17] *See Id.* at 41:15-17.

[18] *See Id.* at 41:20-23.

[19] *See Id.* at 43:6-14.

[20] *See Id.* at 43:15-17.

[21] *See Id.* at 52:8-16.

[22] *See* Or. Denying Mot. for S.J. at 6:15-19.

[23] *See Id.* at 7:1-2.

[24] *See Id.* at 7:2-8.

home were above the standards set by WHO and ATSDR. *Id.* The report also stated that the level of formaldehyde within the subject manufactured home was one hundred (100) times greater than the formaldehyde levels outside the home, and five (5) times greater than the formaldehyde levels of the Appellees' temporary place of residence.[25] Mr. Wells opined that the formaldehyde levels inside the subject home were likely higher in the past due to the fact that formaldehyde levels generally decrease in time from building materials.[26] Mr. Wells also opined that the increased formaldehyde levels were due to the building materials inside the home because most of the Appellees' furnishings and the carpeting had been removed.[27]

III. ARGUMENT

A. TO ENSURE THE PROTECTION OF FUNDAMENTAL LIBERTIES, FEDERAL PRE-EMPTION OF STATE LAWS IS THE EXCEPTION, NOT THE RULE.

1. THE *SUPREMACY CLAUSE* OF THE U.S. CONSTITUTION AUTHORIZES PRE-EMPTION OF STATE LAWS THAT INTERFERE WITH OR ARE CONTRARY TO FEDERAL LAW.

"In order 'to ensure the protection of our fundamental liberties,' the 'Constitution establishes a system of dual sovereignty between the States and the Federal Government.'"[28] "The Framers adopted this 'constitutionally mandated balance of power,' to 'reduce the risk of tyranny and abuse from either front,' because a 'federalist structure of joint sovereigns preserves to the people numerous advantages,' such as 'a decentralized government that will be more

---

[25] *See Id.* at 7:8-12.

[26] *See Id.* at 7:15-19.

[27] *See Id.* at 7:13-16.

[28] *Wyeth v. Levine*, 2009 U.S. LEXIS 1774 at *49 (U.S. Mar. 4, 2009) (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985); *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)) (internal citations omitted).

sensitive to the diverse needs of a heterogeneous society.'"[29] "Under this federalist system, 'the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the *Supremacy Clause*.'"[30] "In accordance with the text and structure of the Constitution, '[t]he powers delegated by the proposed constitution to the federal government, are few and defined,' and '[t]hose which are to remain in the state governments, are numerous and indefinite.'"[31]

"With respect to federal laws, then, the *Supremacy Clause* gives 'supreme' status only to those that are 'made in Pursuance' of '[t]his Constitution.'"[32] "As a result, in order to protect the delicate balance of power mandated by the Constitution, the *Supremacy Clause* must operate only in accordance with its terms." *Id.* (emphasis added).

This Court previously held "that '[t]he *Supremacy Clause* . . . invalidates state laws that interfere with or are contrary to federal law."[33] The process of invalidating a state law is referred to as "pre-emption." Federal pre-emption of a state law can be either express or implied. "To establish a case of express pre-emption requires proof that Congress, through specific language, pre-empted the specific field covered by state law."[34] In the "absence of any express

---

[29] *Id.* (quoting *Atascadero State Hospital, supra,* at 242; *Gregory, supra,* at 458).

[30] *Id.* at *50 (quoting *Tafflin v. Levitt*, 493 U.S. 455, 458, 110 S. Ct. 792 (1990)).

[31] *Id.* (citing U.S. Const., Amdt. 10 and quoting The Federalist No. 45, at 237-238).

[32] *Id.* at *51 (quoting U.S. Const., Art. VI, cl. 2.).

[33] *Davis, et al. v. Eagle Coal and Dock Co., et al.*, 220 W. Va. 18, 22, 640 S.E.2d 81 (2006) (quoting Syllabus Point 1, *Cutright v. Metropolitan Life Ins. Co.*, 201 W. Va. 50, 491 S.E.2d 308 (1997) (emphasis added).

[34] *Hartley Marine Corp., et al. v. Mierke, et al.*, 196 W. Va. 669, 674, 474 S.E.2d 599 (1996) (citing *Interstate Towing Ass'n, Inc. v. City of Cincinnati, Ohio*, 6 F.3d 1154, 1157 n.3 (6th Cir. 1993)).

congressional language indicating that state law is to be pre-empted by federal law, [courts shall] consider only the theory of implied pre-emption." *Id.*

There are two forms of implied pre-emption: field pre-emption and conflict pre-emption. "Field pre-emption [] occurs where the scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'"[35] "[C]onflict pre-emption [] [occurs] where 'compliance with both federal and state regulations is a physical impossibility,' or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]'"[36]

2. PRE-EMPTION OF STATE LAWS IS DISFAVORED IN THE ABSENCE OF CONVINCING EVIDENCE WARRANTING ITS APPLICATION.

Despite the existence of the *Supremacy Clause* in the U.S. Constitution, state courts are reluctant to apply federal pre-emption to state law actions. This Court has stated that "[o]ur law has a general bias against pre-emption."[37] "Given the importance of federalism in our constitutional structure . . . we entertain a strong presumption that federal statutes do not pre-empt state laws; particularly those laws directed at subjects – like health and safety – 'traditionally governed' by the states."[38] "In all pre-emption cases, and particularly those in which . . . the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the

---

[35] *Id.* (quoting *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98, 120 L. Ed. 2d 604 (1992)).

[36] *Id.* (quoting *Gade,* 505 U.S. at 98).

[37] *General Motors Corp. v. Smith, et al.*, 216 W. Va. 78, 83, 602 S.E.2d 520 (2004) (emphasis added).

[38] *Davis*, 220 W. Va. at 25. (quoting *Law v. General Motors Corp.,* 114 F.3d 908, 909-910 (9th Cir.1997); *CSX Transp. v. Easterwood*, 507 U.S. 658, 664 (1993)).

clear and manifest purpose of Congress."[39] "[P]reemption is disfavored in the absence of convincing evidence warranting its application.'"[40] Therefore, in order for the federal pre-emption doctrine to bar state laws, especially laws pertaining to health and safety issues, there must be convincing evidence that Congress intended for such action to occur.

B. APPELLEES' FORMALDEHYDE-BASED NEGLIGENCE CLAIMS ARE NOT BARRED BY THE NATIONAL MANUFACTURED HOUSING CONSTRUCTION AND SAFETY STANDARDS ACT OF 1974.

1. THE NMHCSSA WAS ENACTED BY CONGRESS FOR THE PROTECTION OF CONSUMERS' HEALTH AND SAFETY.

In 1974, the U.S. Congress enacted the National Manufactured Housing Construction and Safety Standards Act (hereinafter "NMHCSSA") to protect, among other things, "residents of manufactured homes with respect to personal injuries."[41] Congress declared that the purpose of the NMHCSSA was to "reduce the number of personal injuries and deaths and the amount of insurance costs and property damage resulting from manufactured home accidents and to improve the quality and durability of manufactured homes."[42] The NMHCSSA authorized the United States Department of Housing and Urban Development (hereinafter "HUD"), a federal agency, to establish these manufactured home construction and safety standards.[43]

The toxic effects of formaldehyde contained within manufactured homes were a concern for Congress on consumers' health and safety when enacting the NMHCSSA. To protect

---

[39] *General Motors Corp.*, 216 W. Va. at 83 n.7 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (internal citation omitted).

[40] *Davis*, 220 W. Va. at 22-23. (quoting *Hartley Marine Corp.*, 196 W. Va. at 673) (emphasis added).

[41] 42 U.S.C. § 5401(5).

[42] *See* Cong. Decl. of Purposes, Dec. 27, 2000.

[43] 42 U.S.C. § 5401.

consumers from the toxic effects of formaldehyde, HUD determined that particleboard material used in the construction of manufactured homes could not emit this chemical in excess of 0.2 parts per million (hereinafter "ppm").[44] HUD also determined that plywood material used in the construction of manufactured homes could not emit formaldehyde gas in excess of 0.3 ppm.[45]

HUD adopted the product standard test in October 1984 over the ambient air standard test in regards to testing formaldehyde gas emissions in wood products used in the construction of manufactured homes.[46] HUD determined that "based on its effectiveness, the availability of reliable test methods, and the potential to prevent formaldehyde problems before the homes [were] sold, [HUD] concluded that the product standard was appropriate." *Id.* at 90. HUD also determined that the product standard would permit detection of formaldehyde gas from the particleboard or plywood before the manufactured home was constructed. *Id.*

HUD also determined that "[e]ach manufactured home shall have a Health Notice on formaldehyde emissions prominently displayed in a temporary manner in the kitchen."[47] This Health Notice was to read as follows:

> Important Health Notice - Some of the building materials used in this home emit formaldehyde. Eye, nose, and throat irritation, headache, nausea, and a variety of asthma-like symptoms, including shortness of breath, have been reported as a result of formaldehyde exposure. Elderly persons and young children, as well as anyone with a history of asthma, allergies, lung problems may be at greater risk. Research is continuing on the possible long-term effects of exposure to formaldehyde.

Id.

---

[44] 24 C.F.R. 3280.308(a)(1).

[45] § 3280.308(a)(2).

[46] *MacMillon, et al. v. Redmon Homes, Inc., et al.,* 818 S.W.2d 87, 89, 1991 Tex. App. LEXIS 2846 (1991).

[47] § 3280.309(a).

2. CONGRESS DID NOT INTEND TO PRE-EMPT STATE TORT LAW WITH THE ENACTMENT OF THE NMHCSSA.

It is apparent that Congress was concerned about the health and safety of consumers of manufactured homes due to their enactment of the NMHCSSA in 1974. It is also apparent that Congress was specifically concerned about formaldehyde-related health risks due to the establishment of formaldehyde emission standards for wood products used in the construction of manufactured homes. Congress's intent in enacting the NMHCCSA was to protect consumers, not to displace state law which provides additional remedies to injured consumers.

a. Express Pre-emption

"This Court has previously recognized that '[i]n any pre-emption analysis, the focus of the inquiry is on congressional intent.'"[48] Congressional intent can be determined through the federal statutory language. Three (3) sections of the NMHCSSA provide insight into Congress's intent in regards to pre-emption of state tort laws involving manufactured homes. Section 5403(d) of the NMHCSSA states:

> Whenever a Federal manufactured home construction and safety standard established under this chapter is in effect, no State or political subdivision of a State shall have any authority to establish, or to continue in effect, with respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.[49]

This section of the NHMCSSA, when read independently of the other two sections, may appear to expressly pre-empt West Virginia common law if such law enacts different standards than those found in this Act. However, when § 5403(d) is read in conjunction with the other sections, a different Congressional intent is revealed. Section 5409(c) of the NMHCSSA states:

---

[48] *Davis*, 220 W. Va. at 23 (emphasis added).

[49] 42 U.S.C. § 5403(d).

> Compliance with any Federal manufactured home construction or safety standard issued under this chapter does not exempt any person from any liability under common law.[50]

Section 5409(c) is a "savings clause" as it preserves state common law. Without this section, state law would be pre-empted pursuant to § 5403(d). Section 5422(a) of the NMHCSSA states:

> Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any manufactured home construction or safety issue with respect to which no Federal manufactured home construction and safcty standard has been established pursuant to the provisions of section 5403 of this title.[51]

Upon reading these three (3) sections of the NMHCCSA together it appears that it was Congress's intent not to pre-empt state law in regards to manufactured home construction and safety issues.

The Jackson County Circuit Court agreed with Appellees' reasoning and stated "[u]pon reading the pre-emptive statutes and the Congressional intent found in the act, it appears to this Court they conflict with each other."[52] The Jackson County Circuit Court further stated, "[s]ection 5409(c) appears to allow state law claims even if these federal standards are complied with; meaning that even if the plywood passes the product standard of 0.3 ppm for formaldehyde emissions, liability may still be found pursuant to West Virginia common law."[53]

Several other jurisdictions have ruled that state law is not expressly pre-empted by the NMHCSSA. The U.S. District Court for the Northern District of Ohio reasoned, "the two provisions [§§ 5403(d) and 5409(c)] when read together preempt state law standards, but do not

---

[50] § 5409(c) (emphasis added).

[51] § 5422(a).

[52] Or. Denying Mot. for S.J. 11:23-24.

[53] *Id.* at 12:4-7.

preempt most state law claims."[54] The Court of Appeals of Missouri noted, "§ 5403(d), indicates that state law standards which differ from federal standards are generally preempted . . . [h]owever, the second preemption provision, § 5409(c), indicates that compliance with federal standards does not affect common law."[55] The Missouri Court went on to hold, "[t]he first preemption clause prohibits state 'standards,' which we interpret to mean legislative or administrative standards, while the second clearly leaves the common law unaffected." *Id.*

Therefore, pursuant to the statutory language of §§ 5403(d), 5409(c), and 5422(a), the NMHCSSA does not expressly pre-empt the Appellees' formaldehyde-based negligence claims.

b. Implied Pre-emption

Congressional intent can also be inferred based upon Congress's legislation in the absence of explicit statutory language. The Appellant argued that Appellees' formaldehyde-based negligence claims were pre-empted based on the doctrine of conflict pre-emption. The Appellant stated the formaldehyde-based negligence claims stood as an obstacle to the achievement of Congress's purposes and objectives. However, the Appellees argued, and the Jackson County Circuit Court agreed, that implied pre-emption did not apply to bar Appellees' formaldehyde-based negligence claims since the claims were not an obstacle to the purposes and objectives of the NMHCSSA.[56]

While living in their manufactured home, the Appellees began experiencing unexplainable health problems.[57] Due to these health issues, the Appellees had the air inside

---

[54] *Shorter, et al. v. Champion Home Builders Co., et al.*, 776 F. Supp. 333, 338, 1991 U.S. Dist. LEXIS 20459 (1991).

[55] *Mizner v. North River Homes, Inc., et al.*, 913 S.W.2d 23, 25, 1995 Mo. App. LEXIS 1019 (1995).

[56] Or. Denying Mot. for S.J. 12:13-15.

[57] *See* Compl. ¶ 20.

their home tested for potential toxins.[58] The formaldehyde levels in the air samples taken from Appellees' home did not exceed the guidelines established by HUD, however, did exceed the standards established by the NIOSH and the ACGIH for indoor residential air.

The Appellant stated that due to the NIOSH and the ACGIH standards being different from the standards adopted by the NMHCSSA, that the Appellees could not bring a negligence action based on the these standards.[59] The Appellant's position is flawed. The standards adopted by the NIOSH and the ACGIH for formaldehyde emissions do not conflict with the NMHCSSA for the following reasons: (1) the federal purpose of the NMHCSSA was to protect consumers' health and safety; (2) the Appellees, as consumers, were among the class that Congress intended to protect by enacting the NMHCSSA; and (3) the more stringent standards of the NIOSH and the ACGIH only enhance the federal purpose of the NMHCSSA by recommending lower amounts of the toxin, thus providing more protection for consumers' health and safety. The Appellees cite *Davis v. Eagle Coal and Dock Co., et al.*, a prominent case previously decided by this Court, to support their position.

In *Davis*, the defendant manufacturer of roof bolter machines claimed that any state law requiring a different standard than that set forth in the federal law was pre-empted.[60] This Court noted that "[t]he defendant . . . define[d] the term 'conflict' for the purposes of conflict pre-emption to mean 'different.'" *Id.* This Court stated:

> [C]onflict pre-emption [] occurs where 'compliance with both federal and state regulations is a physical impossibility,' or where state law stands as an obstacle to

---

[58] *Id.* at ¶ 24.

[59] *See* Br. of Petr. 5:16-22 (Feb. 25, 2009).

[60] 220 W. Va. at 25 (emphasis added).

> the accomplishment and execution of the full purposes and objectives of Congress[.][61]

This Court explained their rationale for refusing to adopt the defendant's argument:

> This Court fails to see how state enforcement of a more stringent standard pertaining to dust collectors would frustrate [Congress's] purposes. Essentially, 'the purpose of the [federal regulation] is to protect the safety of the miner.' Quite frankly, it seems to us that enforcement of a more stringent standard governing dust collectors would have the effect of better protecting the health and safety of miners.[62]

This Court further noted, "[l]ogically, compliance with a more stringent state standard also indicates compliance with a less stringent federal standard." *Id.* at 25. Ultimately, this Court held that compliance with a more stringent state standard did not stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress, which would result in conflict pre-emption. *Id.*

Based upon this Court's ruling in *Davis*, compliance with the more stringent standards established by the NIOSH and the ACGIH for formaldehyde emissions logically means compliance with the less stringent standards established by HUD for formaldehyde emissions. Therefore, Appellees' formaldehyde-based negligence claims do not stand as an obstacle to the achievement of Congress's purpose and objectives for the NMHCSSA. Thus, the NMHCSSA does not impliedly pre-empt the Appellees' formaldehyde-based negligence claims.

3. THE WEIGHT OF AUTHORITY SUPPORTS THE POSITION THAT THE NMHCSSA DOES NOT PRE-EMPT APPELLEES' STATE TORT CLAIMS.

The issue of whether or not the NMHCSSA pre-empts state tort law is one of first impression for this Court. However, West Virginia case law, recent U.S. Supreme Court case

---

[61] *Id.* (quoting *Hartley*, 196 W. Va. at 974; *Gade*, 505 U.S. at 98).

[62] *Id.* at 25-26 (quoting *Westmoreland Coal Co. v. Federal Mine, Etc.*, 606 F.2d 417, 419-420 (4th Cir. 1996)).

law, and case law from various other jurisdictions do not support pre-emption in the case currently before this Court.

a. West Virginia case law.

In *Davis*, as previously discussed, the plaintiffs were roof bolters who suffered from silicosis allegedly due to their dust collection systems failing to protect them from the silica dust released during the machines' operations.[63] These subject dust collectors were regulated by the federal Mine Safety and Health Administration (hereinafter "MSHA") and had been certified as meeting all of the federal standards to be operated in the coal mines pursuant to federal regulations. *Id.* at 20. The defendant manufacturer of the roof bolters moved for dismissal of the plaintiffs' actions on the grounds the plaintiffs' state common law claims were pre-empted by federal law. *Id.* at 22.

In *Davis*, the defendant first argued that field pre-emption prevented the plaintiffs' claims because federal authority completely occupied the field of law regarding roof bolters and silica dust exposure in coal mines. *Id.* at 23. This Court disagreed with the defendant's argument and cited statutory language from the subject federal regulation which stated, "No State law in effect . . . shall be superseded by any provision of this chapter . . . " *Id.*

The defendant's second argument was that express pre-emption was applicable because "Congress's promulgation of regulations that specify the design, engineering, construction, and performance criteria for dust collectors." *Id.* at 24. "Essentially the defendant's argument hinge[d] on the fact that the federal regulations [were] detailed, comprehensive, and mandatory." *Id.* This Court did not agree with defendant's argument and stated, "Congress did not intend to pre-empt State laws that provide for more stringent health and safety standards than federal law .

[63] 220 W. Va. at 21.

. . [and] state law claims may hold the defendant's dust collection system to a more stringent standard than federal law." *Id.*

The defendant's third argument was that state law pertaining to dust collectors was pre-empted due to conflict pre-emption, as previously discussed. *Id.* "[A]ccording to the defendant, any state law or jury verdict requiring a *different* standard than that set forth in federal law [was] pre-empted." *Id.* at 25. This Court rejected the defendant's reasoning regarding the issue of conflict pre-emption. *Id.* This Court stated that it "fail[ed] to see how state enforcement of a more stringent standard pertaining to dust collectors would frustrate these purposes." *Id.*

In *West Virginia Asbestos Litigation*, another pre-emption case before this Court, involved plaintiffs who filed a class action against railroads and manufacturers of various products used by railroads, which the plaintiffs alleged contained asbestos.[64] The defendant manufacturers moved for summary judgment based on the Federal Railroad Safety Act of 1970 (hereinafter "FRSA") and the Boiler Inspection Act which created rules and regulations governing railroad safety. *Id.* at 42. The defendants argued that field pre-emption barred plaintiffs' claims in the area of railroad safety due to these federal Acts. This Court held that "[i]n spite of the strong presumption against federal pre-emption . . . through passage of the Boiler Inspection Act, Congress . . . occupied the field of railroad safety so pervasively that plaintiffs' claims . . . [were] pre-empted." *Id.* at 43. This Court cited the Ninth Circuit's rational that a "broad pre-emptive sweep is necessary to maintain uniformity of railroad operating standards across state lines . . . [l]ocomotives are designed to travel long distances, most railroad routes wending through interstate commerce."[65] This Court stated, "we believe that the federal

---

[64] 215 W. Va. at 41.

[65] *Id.* at 44 (quoting *Law v. General Motors Corp.*, 114 F.3d 908, 910 (9th Cir. 1997)).

government's longstanding and pervasive interest in the oversight of railroads is unique, thus our limited holding in this case is unlikely to have broad application to other areas where state and federal law might overlap ."[66]

Hartley Marine Corp. v. Mierke, is another case involving the issue of pre-emption that has been decided by this Court.[67] In *Hartley*, the plaintiffs protested a fuel use tax which was imposed by the State Tax Commissioner. *Id.* at 671. The plaintiffs alleged that the West Virginia law which authorized the fuel use tax was pre-empted by the Northwest Ordinance of 1787 and the Virginia Compact of 1789 which allowed the federal government to control the inland navigable waterways system. *Id.* at 674. The plaintiffs argued that "the United States Government is responsible for the regulation, servicing, and maintenance of the inland navigable waterways system . . . [and this] indicate[d] a congressional intent to pre-empt states from imposing any laws governing the use of waterways." *Id.* at 674-675. This Court did not agree with the plaintiffs' argument and stated, "[t]he intent to occupy the field is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state."[68] This Court further stated, "[a] conflict occurs 'to the extent it is impossible to comply with both the state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.'"[69] This Court held that the fuel use tax was not pre-empted under the federal law. *Id.* at 683.

These particular cases which have been previously decided by this Court offer guidance in regards to the pre-emption of Appellees' formaldehyde-based negligence claims. The case

---

[66] *Id.* at 45 (emphasis added).

[67] 196 W. Va. 669 (1996).

[68] *Id.* at 676 (citing *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960)).

[69] *Id.* (quoting *California v. Federal Energy Regulatory Comm'n*, 495 U.S. 490, 506 (1990)).

currently before the Court is most similar to *Davis*. The purpose of the NMHCSSA, just as the purpose for the federal regulation in *Davis*, is for the protection of a particular group's health and safety. Both federal regulations contained saving clauses which protected state law from being pre-empted. In both cases the defendant manufacturers claim the state tort laws were pre-empted due to a more stringent safety standard "conflicting" with the federal regulation. Just as this Court held in *Davis* that a more stringent safety standard would not conflict with a less stringent federal standard, this Court should rule that the standards set by the NIOSH and the ACGIH do not conflict with the NMHCSSA.

The case at hand is distinguishable from *West Virginia Asbestos Litigation* in which this Court reluctantly pre-empted state tort law. *West Virginia Asbestos Litigation* involved the railroad industry which was heavily regulated by the federal government due to the need for uniform laws throughout the States. This Court rationalized that due to locomotives traveling great distances and through many states, the railroad industry was unique. This Court cautioned that their holding in this case would not have a broad application. The case currently before this Court pertains to manufactured homes. The Appellees purchased the subject manufactured home in West Virginia, and it was permanently placed on their land in West Virginia. Unlike locomotives, the Appellees' manufactured home did not travel great distances through many states. Therefore, this Court's ruling in *West Virginia Asbestos Litigation* should not impact the decision in the case currently being decided by the Court.

b. U.S. Supreme Court case law.

In *Wyeth v. Levine*, a case decided as recently as March 4, 2009, the U.S. Supreme Court affirmed a trial court's refusal to pre-empt state law in favor of federal regulations.[70] In *Wyeth*, a defendant drug manufacturer appealed a jury verdict which was decided in favor of the plaintiff

[70] 2009 U.S. LEXIS 1774 (Mar. 4, 2009).

who was injured after receiving a drug that contained an inadequate warning label. *Id.* at *5. The issue before the U.S. Supreme Court was whether or not the plaintiff's state tort claims were pre-empted due to the drug's label being in compliance with the federal regulations established by the Food and Drug Administration (hereinafter "FDA"). *Id.*

Prior to this case being decided by the U.S. Supreme Court, a Vermont trial court rejected the defendant's argument that plaintiff's state tort claims were pre-empted by the FDA regulation. *Id.* The trial court "determined that there was no direct conflict between FDA regulations and [plaintiff's] state-law claims because those regulations permit strengthened warnings without FDA approval on an interim basis and the record contained evidence of at least 20 reports [of injuries] similar to [plaintiff's] since the 1960's. *Id.* The Supreme Court of Vermont affirmed the trial court's decision. *Id.* at **1-2.

Upon appeal to the U.S. Supreme Court, the defendant drug manufacturer made two pre-emption arguments based upon the concept of conflict pre-emption. *Id.* at **13-14. The defendant first argued that plaintiff's state tort claims were pre-empted because "it was impossible for it to comply with both the state-law duties underlying those claims and its federal labeling duties." *Id.* The defendant argued that if it had "unilaterally added such a warning [to the drug's label], it would have violated federal law governing unauthorized distribution and misbranding." *Id.* at *24. The defendant "suggest[ed] that the FDA, rather than the manufacturer, bears the primary responsibility for drug labeling." *Id.* at *26. The U.S. Supreme Court cited the Code of Federal Regulations which stated, "[m]anufacturers continue to have a responsibility under Federal law . . . to maintain their labeling and update the labeling with new safety information."[71] The U.S. Supreme Court further stated that "[i]mpossibility pre-emption

[71] *Id.* at *27 (quoting 73 Fed. Reg. 49605).

is a demanding defense . . . [and defendant] has failed to demonstrate that it was impossible for it to comply with both federal and state requirements." *Id.* at *30.

The second argument made by the defendant in *Wyeth* was that plaintiff's state tort law claims were pre-empted because they "create[d] an unacceptable obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[72] The U.S. Supreme Court did not agree with defendant's position and stated, "[t]he most glaring problem with this argument is that all evidence of Congress' purposes is to the contrary." *Id.* at *31. The U.S. Supreme Court went on to say that "Congress enacted [the federal regulation] to bolster consumer protection against harmful products."[73] The U.S. Supreme Court ultimately held, "it [was] not impossible for [defendant] to comply with its state and federal law obligation and that [plaintiff's] common-law claims [did] not stand as an obstacle to the accomplishment of Congress' purposes." *Id.* at *45.

Wyeth is very similar to the case at hand. First, both federal regulations were enacted by Congress for the protection of consumers' safety and protection. Second, both defendant manufacturers argued that conflict pre-emption barred plaintiffs' state law claims due to impossibility and obstacles to the accomplishment of Congress's purposes. Therefore, since the issues in both cases are very similar this Court should look to the recent *Wyeth* decision for guidance.

---

[72] *Id.* at *14.

[73] *Id.* (citing *Kordel v. U.S.*, 335 U.S. 345, 349, 69 S. Ct. 106 (1948); *U.S. v. Sullivan*, 332 U.S. 689, 696, 68 S. Ct. 331 (1948)).

c. Case law from other jurisdictions.

The issue of whether the NMHCSSA pre-empts state tort law has been inconsistently decided in other jurisdictions, however, the weight of authority supports the Appellees' position that pre-emption does not apply.

In *Shorter*, the U.S. District court for the Northern District of Ohio decided a case that involved the issue of the NMHCSSA pre-empting a state tort claim involving consumers' formaldehyde-related injuries.[74] In *Shorter*, the plaintiffs purchased a manufactured home and while they resided in the home began experiencing various medical problems. *Id.* at 334-335. The plaintiffs alleged that their medical problems "were the direct result of high levels of formaldehyde in the mobile home that were being emitted from the particleboard flooring." *Id.* at 335. The defendant manufacturer argued that the plaintiffs' state law tort claims were pre-empted by the NMHCSSA. *Id.* at 336. The district court stated, "[t]he Court cannot find . . . any evidence in the legislative history of the Act that would suggest that a state law claim would frustrate the intent of Congress in reducing personal injuries in mobile homes." *Id.* at 338. The district court further stated, "[i]f anything, the availability of additional state law claims may serve to further reduce the number of personal injuries." *Id.* The district court ultimately held that the NMHCSSA did not pre-empt plaintiffs' state law tort claims. *Id.* (emphasis added).

In *Mizner*, the Court of Appeals of Missouri heard an appeal involving the issue of the NMHCSSA pre-empting a state tort claim involving consumers' formaldehyde-related injuries.[75] In *Mizner*, the plaintiffs purchased a manufactured home and began experiencing health problems while living in the home. *Id.* at 24. The plaintiffs alleged that the "particle board,

[74] 766 F. Supp. 333.

[75] 913 S.W.2d 23.

cabinets, paneling, carpeting, carpet padding, and insulation contained ureaformaldehyde resins, adhesives, and bonding agents which emitted toxic formaldehyde gas into the interior of their mobile home." *Id.* The Missouri trial court dismissed the plaintiffs' state tort claims involving formaldehyde exposure due to federal pre-emption by the NMHCSSA. *Id.* The Missouri Appellate Court closely reviewed §§ 5403(d), 5409(c) and 5422(a) of the NMHCSSA. *Id.* at 25-26. The Missouri Appellate Court disagreed with the trial court, holding that the NHMCSSA did not expressly pre-empt plaintiffs' claims. *Id.* at 26. The Missouri Appellate Court also did not find that the plaintiffs' claims were impliedly pre-empted, and reasoned, "state common law does not conflict with the purposes of the Act or render compliance impossible [and, the] state law claim does not frustrate the intent of Congress in reducing personal injuries in mobile homes." *Id.* at 27. The Missouri Appellate Court reversed and remanded the trial court's decision. *Id.* at 24.

In *MacMillan v. Redman Homes, Inc.*, the Court of Appeals of Texas also heard an appeal regarding the NMHCSSA pre-empting state law tort claims.[76] "In this wrongful death and personal injury suit, plaintiffs appeal[ed] from an order . . . dismissing their case." *Id.* at 88. The plaintiffs alleged their injuries and the death of their elderly mother were a direct result of unsafe levels of formaldehyde gas within their manufactured home. *Id.* The plaintiffs' manufactured home was a repossession that had been repaired with nine (9) sheets of plywood paneling supplied by Georgia-Pacific Corporation.[77] *Id.* at 89. The Texas Appellate Court affirmed the trial court's decision that the NMHCSSA expressly pre-empted state rules and regulations "that [were] not identical to the federal formaldehyde standards." *Id.*

[76] 818 S.W.2d 87, 1991 Tex. App. LEXIS 2846 (1991).

[77] Georgia-Pacific Corporation supplied the Appellant with the particleboard used in Appellees' manufactured home.

The decision by the Texas courts in *MacMillon* to pre-empt state law is the minority opinion. Other jurisdictions have opined that Texas erred in their *MacMillon* decision. The Court of Appeals of Missouri stated, "*MacMillon v. Redman Homes, Inc.*, is founded upon the erroneous assumption that the Manufactured Home Act itself provides a remedy to injured plaintiffs."[78] The Missouri Court further stated, "[i]f, in fact, it were the case the Manufactured Home Act provided a new remedy for injured plaintiffs, one could raise a strong argument in favor of preemption." *Id.*

These aforementioned cases from other jurisdictions are directly on point with the issues in the case currently before the Court. The majority of jurisdictions have held that the NMHCSSA does not pre-empt state common law actions. Texas has adopted the minority opinion that the NMHCSSA does pre-empt state law actions based upon standards that are not identical to the standards established by HUD. However, based upon West Virginia case law, U.S. Supreme Court case law and the case law from the majority of other jurisdictions, this Court should not pre-empt Appellees' state law claims due to conflicting with the NMHCSSA.

4. HUD LACKS AUTHORITY TO DEEM STATE TORT LAWS PRE-EMPTED UNDER THE NMHCSSA.

Pursuant to the NMHCSSA, HUD, a federal agency, was authorized by Congress to establish safety standards for the construction of manufactured homes.[79] In 1984, HUD developed safety standards for formaldehyde emissions in manufactured homes.[80] HUD adopted the product standard which tests random sheets of plywood and particleboard for formaldehyde emissions to ensure they are not in violation of the HUD standards (0.2 ppm for plywood and 0.3

[78] *Mizner*, 913 S.W.2d at 26.

[79] 42 U.S.C. § 5401.

[80] 24 C.F.R. § 3280.308, *see* 49 Fed. Reg. 31,996 (1984).

ppm for particleboard). *Id.* At that time, HUD rejected the ambient air standard which would test indoor air of manufactured homes to determine if the formaldehyde emissions were in violation of the set standards (targeted maximum of 0.4 ppm). *Id.*

Although Congress authorized HUD to develop safety standards for the construction of manufactured homes, it did not authorize the agency to pre-empt state law. Even though Congress did not expressly authorize HUD to pre-empt state law, a HUD regulation contains the following pre-emptive statement:

> No State or locality may establish or enforce any rule or regulation or take any action that stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The test of whether a State rule or action is valid or must give way is whether the State rule can be enforced or the action taken without impairing the Federal superintendence of the manufactured home industry as established by the Act.[81]

HUD's statement in § 3282.11(d) is very broad and potentially unconstitutional towards the States. HUD also stated its intent was for its "standards [to] preempt State and local formaldehyde standards."[82] Although HUD's intent was to pre-empt state laws, Congress did not convey the power of pre-emption, thus HUD's pre-emptive regulation violates the U.S. Constitution.

The U.S. Supreme Court has cautioned against federal agencies' unconstitutional attempts at pre-emption of state laws. In *Wyeth*, the U.S. Supreme Court stated, "[t]his Court has recognized that an agency regulation with the force of law can pre-empt conflicting state requirements.[83] "In such cases, the Court has performed its own conflict determination, relying on the substance of state and federal law and not on agency proclamations of pre-emption." *Id.*

---

[81] 24 C.F.R. § 3282.11(d).

[82] 49 Red. Reg. 31,997 (1984).

[83] 2009 U.S. LEXIS 1774 at *35 (citing *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000)).

(emphasis added). "In prior cases, we have given 'some weight' to an agency's views about the impact of tort law on federal objectives [and the] weight we accord the agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness."[84]

Justice Thomas in his concurring opinion in *Wyeth* noted, "a federal agency may pre-empt state law only when and if it is acting within the scope of its congressional delegated authority . . . [for] an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign state."[85] Justice Thomas went on to say, "[p]re-emption analysis should not be 'a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives, but an inquiry into whether the ordinary meanings of state and federal law conflict."[86] "Thus, no agency . . . can pre-empt a State's judgment by merely musing about goals or intentions not found within or authorized by the statutory text." *Id.* at *79.

In *Alexander v. Sandoval*, the U.S. Supreme Court analogized that "[a]gencies may play the sorcerer's apprentice but not the sorcerer himself."[87] HUD's attempt at pre-empting state law through the NHMCSSA means that HUD is no longer just playing the role of the sorcerer's apprentice, but playing the role of the sorcerer. HUD was not given the express permission of Congress to play this role; therefore, their pre-emptive attempts are unconstitutional and unenforceable.

---

[84] *Id.* at *36 (quoting *Geier*, 529 U.S. at 883, *U.S. v. Mead Corp.*, 533 U.S. 218. 234-235 (2001) (emphasis added).

[85] *Id.* at *56 (quoting *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 617 (1997) (emphasis added).

[86] *Id.* at *57 (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 459 125 S. Ct. 1788 (2005) (Thomas, J., concurring in judgment in part and dissenting in part).

[87] 532 U.S. 275, 291 (2001).

5. PURSUANT TO THE SAVINGS CLAUSE, APPELLANT'S COMPLIANCE WITH THE NMHCSSA DOES NOT BAR APPELLEES' FORMALDEHYDE-BASED NEGLIGENCE CLAIMS.

As addressed earlier, § 5409(c) of the NMHCSSA states, "Compliance with any Federal manufactured home construction or safety standard issued under this chapter does not exempt any person from any liability under common law."[88] "This [savings] clause indicates that Congress did not intend to preempt all state-law claims involving mobile homes."[89] Through the statutory language of § 5409(c), Congress has made it clear that compliance with the NMHCSSA will not bar liability under state common law.

The Appellant argues that summary judgment should have been granted by the trial court based upon their compliance with the NMHCSSA regarding the formaldehyde emissions in the wood products used in the construction of Appellees' home. However, this Court has refused to adopt such a broad position. In *Davis*, the defendant manufacturer argued "that its faithful compliance with all of the federal standards that regulate dust collectors should shield it from claims that its dust collectors [were] defective."[90] This Court disagreed with the defendant's argument and stated, "[w]hile this Court agrees that compliance with the federal standards is compelling evidence on the defendant's behalf in any state law claim, such claims are not completely foreclosed." *Id.* at 26-27.

The U.S. Supreme Court has also refused to adopt the position that compliance with a federal regulation bars state law claims. In *Wyeth*, in regards to an inadequate warning claim "the trial judge instructed the jury that it could consider evidence of [defendant's] compliance

[88] 42 U.S.C. § 5409(c) (emphasis added).

[89] *Redman Homes, Inc. v. Ivy*, 920 S.W.2d 664, 667, 1996 LEXIS 36 (1996).

[90] 220 W. Va. at 26.

with [federal regulation's] requirements but that such compliance did not establish that the warnings were adequate."[91]

Other jurisdictions have specifically refused to adopt the position that compliance with the NMHCSSA bars state law claims. In *Shorter*, the defendant manufacturer argued "that because it complied with HUD requirements, the product [was] not defective as a matter of law."[92] The U.S. District Court for the Northern District of Ohio held that "while the state [sic] of Ohio may not institute is own safety standards, state law claims may still be brought." *Id.* at 338.

Appellant's compliance with the NMHCSSA in regards to the particleboard used in the Appellees' home not violating formaldehyde emissions should be treated as one piece of evidence going toward the issue of Appellant's negligence. Appellant's compliance with the NMHCSSA "may be taken into account by the jury . . . but absent preemption the jury need not give that determination conclusive weight." *Id.* Therefore, the Jackson County Circuit Court was correct in their denial of Appellant's summary judgment request.

C. PUBLIC POLICY FAVORS INJURED CONSUMERS HAVING REMEDIES AVAILABLE THROUGH STATE TORT ACTIONS.

1. CONGRESS'S INTENT NOT TO PRE-EMPT STATE LAW IS EVIDENCED BY THE NMHCSSA NOT CREATING A PRIVATE CAUSE OF ACTION FOR INJURED CONSUMERS.

The statutory language contained in the NMHCSSA does not provide an alternative cause of action for injured consumers. This issue has been addressed in other jurisdictions. The Fourth District Circuit held that the NMHCSSA "does not create, expressly or impliedly, any private

[91] 2009 U.S. LEXIS 1774 at *11 (emphasis added).

[92] *Shorter*, 776 F. Supp. at 337.

right cause of action" for injured consumers.[93] "It is to be noted that Section 613(c) of the Senate version of the Act would have given injured owners a right to sue for violation of the federal standards [and] [t]he fact that this provision was omitted from the final version [is persuasive] that the Act carries no private right of action."[94]

Due to the fact that Congress did not create a private cause of action for injured consumers through their enactment of the NMHCSSA, supports Appellees' position that Congress did not intend to pre-empt state tort laws which already provide remedies for these consumers. Appellees' rational is similar to the rational of the U.S. Supreme Court in *Wyeth*. The U.S. Supreme Court noted that "Congress did not provide a federal remedy for consumers harmed by unsafe ineffective drugs [thus] [e]vidently, it determined that widely available state rights of action provided appropriate relief for injured consumers."[95]

In *Mizner*, the Court of Appeals of Missouri stated, "[t]he fact that the Manufactured Home Act provides no alternative cause of action for a plaintiff injured by formaldehyde exposure is an additional stimulus to reason that it does not preempt state common law: 'It is difficult to believe that Congress, would without comment, remove all means of judicial recourse for those injured by illegal conduct."[96] The Missouri Court went on to say "[a]bsent strong evidence to the contrary we will not presume that Congress intended this safety legislation to deprive injured persons of all remedies." *Id.* at 27.

---

[93] *Heuer v. The Forest Hill State Bank*, 728 F. Supp. 1199, 1989 U.S. Dist. LEXIS 16003 (1989).

[94] *Mizner*, 913 S.W.2d at 26 (citing 1974 U.S. Code Cong. & Admin. News at 4412).

[95] *Wyeth*, 2009 U.S. LEXIS 1774 at *32.

[96] 913 S.W.2d at 26-27 (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) (emphasis added).

Therefore, Appellees' argument that Congress did not intend to displace state law is well supported due to the fact the NMHCSSA does not provide an alternative remedy for injured consumers.

2. STATES HAVE SUBSTANTIAL INTERESTS IN PROTECTING THEIR CITIZENS' RIGHTS IN REGARDS TO FEDERAL PRE-EMPTION.

This Court stated, "[w]e are mindful that 'for every wrong there is supposed to be a remedy somewhere.'"[97] "[T]he concept of American justice . . . pronounces that for every wrong there is a remedy."[98]

The Attorneys General from forty-seven (47) states, including Darrell V. McGraw, Jr., the Attorney General for the State of West Virginia, joined efforts and issued an amicus brief to the U.S. Supreme Court in support of Respondent Levine in *Wyeth*.[99] In the brief the Attorneys General gave detailed reasons for disapproving of federal pre-emption of their states' tort laws.

The brief specifically addressed two (2) interests of the Attorneys General that were related to the outcome of *Wyeth*. *Id.* at 1. "*First*, the amici are responsible for the enforcement of laws that safeguard public health, safety, and welfare [and] therefore have a fundamental interest in preserving the appropriate balance of authority between the states and the federal government." *Id.* "*Second*, this particular case is of crucial importance because the position espoused by Petitioner and the United States would represent an unprecedented elimination of remedies available to consumers." *Id.* The Attorneys General stated, "[c]ommon law duties play

---

[97] *In Re: West Virginia Asbestos Litigation*, 215 W. Va. at 43 n.2 (quoting *Sanders v. Meredith*, 78 W. Va. 564, 572 (1916)).

[98] *Id.* (quoting *O'Neil v. City of Parkersburg*, 160 W. Va. 694, 697 (1977)).

[99] Br. of Amici Curiae Vt., Ala., Alaska, Ariz., Ark., Cal., Colo., Conn., Del., Fla., Ga., Haw., Idaho, Ill., Ind., Iowa, Kan., Ky., La., Me., Md., Mass., Minn., Miss., Mo., Mont., Nev., N.H., N.J., N.M., N.Y., N.C., N.D., Ohio, Okla., Or., Pa., R.I., S.C., S.D., Tenn., Utah, W. Va., Va., Wash., Wis., and Wyo. In Support of Respt., 2006 U.S. Briefs 1249, 2008 U.S. S. Ct. Briefs LEXIS 681 (Aug. 14, 2008).

a pivotal role in protecting the health and welfare of the states' citizens [and] [t]hrough the evolution of state common law and by legislative enactments, the states have developed and refined their tort systems to accomplish that end." *Id.* The Attorneys General requested that the U.S. Supreme Court reject the "sweeping argument" of the defendant drug manufacturer, Wyeth. *Id.*

The Attorneys General stated that "the states' traditional common-law tort systems have continued to compensate injured consumers." *Id.* at 7-8. "State tort actions took the federal regulatory regime into account, but in the form of the regulatory compliance defense, which allows juries to consider compliance with federal statutes and regulations when determining a manufacturer's liability."[100] "Allowing States to exercise continued power ensures that government is 'more sensitive to the diverse needs of heterogeneous society'; 'increases opportunity for citizen involvement in democratic processes'; 'allows for more innovation and experimentation in government'; and 'makes government more responsive by putting the States in competition for a mobile citizenry.'"[101] "When state laws are preempted, none of those interests is [sic] served." *Id.* They further stated, "[w]hen Congress wishes to displace state law in order to achieve federal objectives more efficiently, it knows how to do so [and] [b]y one count . . . has enacted 355 statutes that contain express preemption provisions." *Id.* at 19. "Congress's decision *not* to express any intent to displace state law should therefore be given great weight." *Id.*

In *Wyeth*, the U.S. Supreme Court itself stated reasons for which Congress may have decided not to displace state tort law. First, federal agencies tend to regard state law as a

[100] *Id.* at 8 n.2 (citing Robert B. Leflar & Robert S. Adler, *The Preemption Pentad: Federal Preemption of Products Liability Claims after Medtronic*, 64 Tenn. L. Rev. 691, 715 (1997).

[101] *Id.* at 24 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

"complementary form" of product regulation.[102] Second, federal agencies have limited resources to monitor the numerous products on the market for which they are responsible. *Id.* Third, "[s]tate tort suits uncover unknown [product] hazards and provide incentives for [product] manufacturers to disclose safety risks promptly." *Id.* Fourth, state tort actions "serve a distinct compensatory function that may motivate injured persons to come forward with information." *Id.* at **39-40. "Thus, . . . state law offers an additional, and important, layer of consumer protection that complements [federal] regulation." *Id.* at *40. Therefore, public policy favors injured consumers having remedies available to them through state tort actions.

D. THE INTRODUCTION OF APPELLEES' AMBIENT AIR SAMPLES IS PROPER AS EVIDENCE OF APPELLANT'S NEGLIGENCE.

1. HUD HAS NOT ESTABLISHED A STANDARD FOR FORMALDEHYDE EMISSIONS FROM SCRAP PARTICLEBOARD, THEREFORE, THE *SUPREMACY CLAUSE* HAS NOT BEEN TRIGGERED.

Appellees intend to introduce ambient air samples taken from their manufactured home on several occasions, which each indicate the presence of formaldehyde gas. The formaldehyde levels found in the subject manufactured home were over the exposure limit guidelines established by the NIOSH and the ACGIH. The guidelines for formaldehyde emissions established by the NIOSH and the ACGIH are more stringent than the targeted 0.4 ppm limit established by HUD for manufactured homes.

The Appellees also intend to introduce evidence to link these elevated formaldehyde levels within their home to excessive scrap particleboard debris that contaminated the air ducts of the home. The Appellees have not alleged that the sheets of particleboard used in the construction of the subject manufactured home violated the HUD standards for formaldehyde

[102] *Wyeth*, 2009 U.S. LEXIS 1774 at *39.

emissions pursuant to the product standard test.[103] However, Appellees have alleged that the sheets of particleboard were improperly used when scrap pieces were placed in the air ducts of the subject manufactured home.[104]

The statutory language of the NMHCSSA is silent on the issue of formaldehyde emissions from scrap particleboard. Therefore, HUD has not established a standard for formaldehyde emissions from scrap particleboard used in the construction of manufactured homes. According to § 5422(a) of the NMHCSSA, as previously discussed, "[n]othing in this chapter shall prevent any . . . court from asserting jurisdiction under State law over any manufactured home construction or safety issue with respect to which no Federal manufactured home construction and safety standard has been established."[105] Due to the fact that a federal standard has not been established pertaining to formaldehyde emissions from scrap particleboard, a state tort action involving such an issue could not logically interfere with or contradict a federal standard, thus the *Supremacy Clause* has not been triggered.

2. THE INTRODUCTION OF THE AIR SAMPLES AS EVIDENCE OF APPELLANT'S NEGLIGENCE IS PROPER PURSUANT TO THE WEST VIRGINIA RULES OF EVIDENCE.

The issue of whether or not the ambient air samples taken from the Appellees' home should be presented as evidence of Appellant's negligence is properly addressed pursuant to the West Virginia Rules of Evidence. The samples taken from the Appellees' home which revealed elevated formaldehyde levels is "relevant evidence" to the issue of Appellant's negligence. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that

---

[103] *See* Compl.

[104] *See Id.* at ¶ 37.

[105] 42 U.S.C. § 5422(a).

is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[106] "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of West Virginia, by these rules, or by other rules adopted by the Supreme Court of Appeals."[107] "Evidence which is not relevant is not admissible." *Id.*

The ambient air samples taken from Appellees' home is relevant to the negligence claims against Appellant involving the scrap particleboard debris found in the air ducts of the subject manufactured home. The evidence of elevated formaldehyde levels in the indoor environment of the subject home makes it more probable that the Appellant was negligent in their construction of the Appellees' home, therefore, is admissible as evidence. Under the West Virginia Rules of Evidence the air samples are proper evidence of Appellant's negligence, and can be properly presented to the jury.

3. HUD'S REJECTION OF THE AMBIENT AIR STANDARD IS IRRELEVANT TO THE AIR SAMPLES BEING INTRODUCED AS EVIDENCE OF APPELLANT'S NEGLIGENCE.

The fact that HUD rejected the ambient air standard for testing formaldehyde emissions in manufactured homes is irrelevant to the introduction of the air samples. The Appellees do not suggest that the product standard for testing sheets of particleboard prior to their installation in a manufactured home is flawed. In fact, Appellees appreciate HUD's argument that the product standard is the better test to determine if the particleboard complies with the standards prior to construction of the home. The Appellees realize that the ambient air standard test would require a manufacturer to construct a home, test the ambient air, and then possibly deconstruct the home to remove sheets of particleboard if the formaldehyde levels were above the HUD-established

[106] W. Va. R. Evid. 401.

[107] W. Va. R. Evid. 402.

standards. Therefore, HUD's explanation for using the product standard to test sheets of particleboard is logical, and not questioned by the Appellees.

However, the product standard is completely irrelevant in regards to the negligence claims involving particleboard debris found in the air ducts of the Appellees' home. First, the subject manufactured home owned by the Appellees was already constructed by the Appellant at the time the Appellees became aware there was a problem. This makes using the product standard test impossible to conduct. Also, the use of the product standard test on the scrap pieces of particleboard may not be possible depending on their size. Second, the Appellees' negligence claims allege that the source of the formaldehyde emissions is the scrap particleboard debris found inside the air duct system of the home, not the intact sheets of particleboard used to construct the home.[108] Given the fact the Appellees alleged the scrap particleboard contained in the air ducts emitted the formaldehyde gas, the product standard test is irrelevant. Therefore, the only legitimate test to substantiate Appellees' claims of increased formaldehyde emissions inside their home is the ambient air test.

IV. CONCLUSION

For the foregoing reasons, the Appellees request this Court hold: (1) that the NMHCSSA does not pre-empt and bar the Plaintiffs' formaldehyde-based negligence claims; (2) that the Plaintiffs may present evidence of ambient air testing to support their negligence claims; and (3) the savings clause of 42 U.S.C. § 5409(c) precludes the Defendants' motions for summary judgment in regards to the formaldehyde-base negligence claims.

[108] *See* Compl. ¶¶ 37-40.

V. STATEMENT OF RELIEF SOUGHT

For the foregoing reasons, the Appellees respectfully ask this Court to answer Certified Question (I) negatively and Certified Questions (II) and (III) affirmatively thereby ensuring the protection of fundamental liberties and the State of West Virginia's sovereign authority.

VI. REQUEST FOR ORAL ARGUMENT

Because this case raises substantial issues involving the appropriate balance of authority between the State of West Virginia and the U.S. Government, Appellees request that this Court grant them the opportunity to make an oral argument to the Court.

RONALD LEE HARRISON and
BRENDA G. HARRISON,

By Counsel

Frank Venezia (W.V. State Bar No. 4637)
Jamie F. Little (W.V. State Bar No.10680)
SHAFFER & SHAFFER PLLC
330 State Street
P.O. Box 38
Madison, West Virginia 25130
(304) 369-0511

Thomas N. Whittier (W.V. State Bar No. 4029)
HEDGES, JONES, WHITTIER & HEDGES
P.O. Box 7
Spencer, West Virginia 25276
(304) 927-3790

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 082094

RONALD LEE HARRISON and
BRENDA G. HARRISON,
Plaintiffs-Appellees,

v.

SKYLINE CORPORATION,
Defendant-Appellant.

County:	**Jackson**
Court:	**Circuit Court of Jackson County**
Judge:	**The Honorable Thomas C. Evans, III**
Case No.:	**05-C-50**

CERTIFICATE OF SERVICE

I, Jamie F. Little, of Shaffer & Shaffer, PLLC, counsel for Ronald Lee Harrison and Brenda G. Harrison do hereby certify that service of the "Brief of Appellees" was made upon the following by mailing, postage prepaid by United States Regular Mail, of true and exact copies, on this 25th day of March, 2009, to the following:

John R. Teare, Jr., Esq.
BOWLES RICE McDAVID GRAFF & LOVE LLP
600 Quarrier Street
Post Office Box 1386
Charleston, West Virginia 25325-1386
Counsel for Defendant/Appellant Skyline Corporation

Jamie F. Little (WVSB No. 10680)